



October 7, 2019

VIA E-MAIL ONLY: KRISTA.D.SABIN@USACE.ARMY.MIL

Department of the Army
Attention: District Engineer
c/o Ms. Krista Sabin
U.S. Army Corps of Engineers
Jacksonville District
Palm Beach Gardens Permits Section
4400 PGA Boulevard, Suite 500
Palm Beach Gardens, Florida 33410

**RE: United States Sugar Corporation's Comments on the Corps' Public Notice
for the A-2 Stormwater Treatment Area (STA), SAJ-2018-03427(SP-KDS)**

Dear Ms. Sabin:

This firm represents United States Sugar Corporation ("USSC"), an interested stakeholder in issues related to management of Lake Okeechobee ("Lake"), including the Comprehensive Everglades Restoration Plan ("CERP") and all of its incremental components. On September 5, 2019, the U.S. Army Corps of Engineers ("Corps") published notice of the above-referenced permit application (referred to herein as the "Public Notice"). On behalf of USSC, please accept the following timely submitted comments and add this letter and all attachments into the A-2 STA Project administrative record.

As a landowner in the Everglades Agricultural Area ("EAA"), USSC has a substantial interest in the proposed A-2 STA Project. Farming in Florida since 1931, USSC owns and farms approximately 245,000 acres of farm lands located Glades, Hendry, Palm Beach, and Martin counties. The farmers in the EAA have participated in Everglades restoration, paying an agricultural privilege tax (a tax unique to the EAA) to support Everglades restoration, investing more than \$400 million in restoring and preserving the Everglades, and implementing the most successful and well documented EAA Best Management Practices program, reducing phosphorus loads in stormwater runoff by a long term average of 57 percent. USSC has a substantial interest in the availability of irrigation water for its crops and the success of water quality improvements in the region. USSC requests the Corps consider the following matters as it considers permitting the A-2 STA.

USSC Supports the CEPP Project in which the A-2 STA Is a Component

USSC supports the proposed CERP project as described and approved in the Central Everglades Planning Project (“CEPP”) Post-Authorization Change Report (“PACR”). The design in the approved PACR includes both an A-2 Reservoir, designed to store excess Lake water during times of damaging estuary releases, and an A-2 STA, designed to treat water stored in the A-2 Reservoir before release. The PACR analyzed the selected alternative, C240A, and its operational plan was premised and approved on both components operating together. The PACR only studied implementation as part of the larger and carefully sequenced CEPP project and did not allow for out of sequence operations.

Putting the A-2 STA Project First in Sequence Raises Questions About the Corps’ and State’s Ability to Satisfy State and Federal Law on Water Supply and Water Quality

SFWMD has expedited its efforts to construct the A-2 STA, building it out of sequence with the remainder of the overall EAA Reservoir CERP Project. The recent working version of the draft Integrated Delivery Schedule included a construction start date for the A-2 STA in 2020, and SFWMD applied for the above-referenced Corps’ permit, indicating that SFWMD intends to construct and operate the project in the near future, and will likely do so prior to construction and operation of the A-2 Reservoir component of the project. Indeed, the Public Notice itself injects uncertainty as to whether the A-2 Reservoir component will be constructed, stating in the Overall Project Purpose, “To provide water quality improvements to the **Miami Canal**. In addition **if the Corps constructs the proposed A-2 Reservoir**, the overall project purpose would include improving water quality and assisting in achieving the water quality based effluent limitation (WQBEL) for water discharged from the A-2 Reservoir.” (emphasis added).

To date, the design and planning has not considered a standalone A-2 STA, and the operational plan for the A-2 STA has not been provided to the public. The A-2 STA is only being built because it is part of the EAA Reservoir CERP project. The CEPP PACR analyzed the selected alternative, C240A. In analyzing the effects of this federal action, the Corps should study and model the operational plan for the A-2 STA as a standalone feature and ensure state and federal law are satisfied in the operational plan. The public should have the opportunity to review the operational plan for the A-2 STA prior to its construction. Similarly, the operational plan should be considered as part of the state water quality certification for this permit as referenced in the Authorization from Other Agencies heading of the Public Notice. Any limitations on A-2 STA operations that are necessary to satisfy state and federal law should be included as permit conditions in accordance with 33 C.F.R. § 325.4.

Proper sequencing of the CEPP components is essential to achieving water quality standards. When other CEPP components were constructed out of sequence, for example, the S-333N, permit conditions were necessary to ensure operations do not contribute to water quality concerns. Lake operations in recent years sent large amounts of water south through the existing

STAs, overloading them.¹ Overloading the STAs beyond their designed capacity for Lake water risks potential water quality violations of the existing STA permits, the federal 1992 Consent Decree, and the assumptions in Restoration Strategies, which supported resolution of the litigation over the STA discharges.² Continued operations sending hundreds of thousands of ac-ft of Lake water to the STAs threaten existing STA operations. While it is not clear what the source of the water for the A-2 STA will be (the Public Notice only states the Miami Canal), if the State and the Corps propose to send Lake water to the A-2 STA, without the benefit of the A-2 Reservoir component, permit conditions relating to operations to protect water quality and water supply would be needed. Conversely, if the State and Corps do not intend to send Lake water to the A-2 STA, then permit conditions should be included to confirm same. Water quality and water supply were specifically addressed in the Florida Department of Environmental Protection's CEPP PACR Final Order dated March 5, 2018, but only as to the selected approved alternative, *i.e.*, both components operating together.

The State and the Corps Must Undertake an Updated Savings Clause Analysis to Ensure Water Supply Is Protected

An updated State and Federal Savings Clause analysis must be performed to provide reasonable assurances of meeting State and federal CERP permitting requirements and the FDEP's CEPP PACR Final Order noted above.³ During periods of low lake stage or drought conditions, the STAs become a water user; requiring deliveries of water to prevent dry-out and the resultant first-flush release of phosphorus upon re-wetting. The water supply source for the A-2 STA remains unclear and is of particular interest in light of both the interim LORS08 and upcoming "LOSOM" Lake regulation schedules. Also, CERP projects require assurance of project benefits to both the natural system and human environment, and it is unclear whether these assurances been provided. As to the human environment, before eliminating or transferring water as a result of implementing the A-2 STA, the lost water must be identified along with a new water supply source of comparable quantity and quality. Further, State law requires assurance the quantity of water available to existing legal users shall not be diminished by implementation of a project component. The Public Notice did not identify what documentation the State has provided in this regard.

¹ LORS08 EIS includes STA Lake release design capacity of approximately 60,000 ac-ft per average year to STA 3/4. The Restoration Strategies Plan, when fully constructed, has a full suite of infrastructure designed to treat approximately 87,000 ac-ft per year of Lake Okeechobee water. *See, e.g.*, Restoration Strategies Regional Water Quality Plan, dated April 27, 2012, prepared by South Florida Water Management District. Lake operations in recent years have sent significantly more water to the STAs, approximately 200,000 to 300,000 ac-ft per year of Lake Okeechobee water. *See* August 8, 2019 South Florida Water Management District Governing Board Presentation, "Overview of Efforts to Achieve the Water Quality Based Effluent Limit for the Everglades Stormwater Treatment Areas".

² The 1992 Federal Consent Decree was entered in *U.S. v. South Florida Water Management District*, Case No. 1:88-cv-01886-FAM; the litigation over STA discharges was in *Miccosukee Tribe of Indians of Florida v. U.S.*, Case No. 1:04-cv-21448-WPD.

³ The federal Savings Clause is codified at Section 601(h)(5) of the Water Resources Development Act of 2000, Pub. L. No. 106-541, § 601, 114 Stat. 2690 (Dec. 11, 2000). The state Savings Clause is codified at Section 373.1501(5)(d), Florida Statutes.

Conclusion

USSC looks forward to continued participation in CERP Project planning and implementation and appreciates Corps' consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Burgess".

Rick J. Burgess
Gunster Law Firm
Attorneys for the United States Sugar Corporation

Cc:
Client
SFWMD Executive Director, Drew Bartlett
SFWMD Governing Board members
FDEP Secretary, Noah Valenstein